ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| STATE OF NORTH DAKOTA, et al.,<br><br>Petitioners,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>Respondent. | ) | Case No. 16-1242 (and consolidated cases) |

**REPLY IN SUPPORT OF PETITIONERS' MOTION TO GOVERN FURTHER PROCEEDINGS**

State and Non-State Petitioners ("Petitioners") in the above-captioned consolidated petitions for review respectfully submit this Reply in Support of Petitioners' Motion to Govern Further Proceedings.

Despite Respondents' and Movant-Intervenors' attempts to obfuscate this issue for the Court in their responses to Petitioners' Motion to Govern Proceedings, Petitioners' request to bifurcate the briefing remains simple and is aimed at promoting efficiency for the Court by deferring from litigation issues that have the potential to be resolved among the parties. As described in their motion, Petitioners are proposing bifurcation into two separate briefing schedules: (1) fundamental issues of legal authority, which relate to "fundamental issues regarding EPA's ***authority*** under the CAA to issue the Rules," Pets. Mot. at 8

(emphasis added); and (2) implementation-based issues, which "assum[e] *arguendo* that EPA has authority to issue [the] Rules" but challenge the "implementation issues regarding the Rules[ ]," *Id.* at 9. Regarding the first set of issues, Petitioners believe strongly that EPA lacks legal authority to promulgate this Rule,[1] and are thus incentivized to seek expeditious briefing and a final decision regarding EPA's authority. In the interim, the Rule is currently in effect and Petitioners are concerned that certain implementation-based issues create compliance risks. At the same time, Petitioners are hopeful that the implementation-based issues might be sufficiently resolved without the Court's involvement through negotiations with EPA and seek an opportunity to pursue settlement discussions before needlessly expending the resources of the Court and the parties in briefing those issues. Severing these implementation-based issues and assigning them to a separate briefing schedule will facilitate the parties' efforts to quickly resolve to these immediate compliance issues without necessarily needing to engage in litigation.

## I. Bifurcation would not "substantially delay the final resolution" but instead promotes judicial efficiency.

Respondents claim that "bifurcation would substantially delay the final resolution of these petitions for review by requiring two full rounds of briefing and

[1] Petitioner Interstate Natural Gas Association of America has only raised implementation-based issues in its petition for review.

oral argument." EPA Response, Dkt. 1644526, at 2; *see also* Response of Movant-Intervenors, Dkt. 1644519, at 2. This is completely wrong, and it overlooks the purposes behind Petitioners' request for bifurcation.

As detailed in Petitioners' Motion, bifurcation "will enable the Court to promptly resolve the fundamental legal issues related to *whether EPA has authority under the CAA to issue the Rules and regulate methane emissions*." Pets. Mot. at 7 (emphasis added). EPA's decision to regulate methane presents novel and significant legal issues that can—and should—be resolved expeditiously. The fundamental legal issues are discrete, and decisions on them could result in the Rules being invalidated. Therefore, contrary to Respondents' and Movant-Intervenors' assertions, bifurcation of the issues will allow the parties to immediately brief the fundamental legal issues, such as whether EPA has statutory authority to regulate methane as a greenhouse gas.

Such an approach will conserve the resources of the Court and the parties by deferring briefing on the myriad complex and fact-based individual issues relating to the Rule's implementation, which Petitioners have listed in Section III below, while the parties work toward a possible negotiated resolution. Thus, bifurcation will provide the parties with an opportunity to informally resolve these implementation-based issues outside of litigation, which may significantly narrow, if not eliminate entirely, the need for briefing on implementation-based issues.

## II. Bifurcation would not "prolong regulatory uncertainty," but instead presents a logical way to manage judicial review of a highly-technical and complex regulatory action.

Respondents and Movant-Intervenors claim that "bifurcation would prolong the regulatory uncertainty stemming from the Petitioners' challenges, and unfairly give them two bites at the apple." EPA Response at 3; *see also* Response of Movant-Intervenors at 9. This shows a lack of understanding of both the rulemaking process and judicial review process.

First, bifurcation will not result in "regulatory uncertainty," because, unless the parties successfully obtain a stay, judicial review does not postpone the effectiveness of a regulation. *See* 42 U.S.C. § 7607(b). Any assertion that Petitioners are seeking to "delay the final resolution" is easily repudiated by Petitioners' desire to litigate the core legal issues as expeditiously as possible while simultaneously working with EPA to resolve implementation-based issues.

Second, Petitioners' motivation behind seeking bifurcated briefing is not, as Respondents insinuate, to "get two bites at the apple," but instead to promote judicial efficiency by first litigating the fundamental issue—that EPA plainly lacks legal authority for these regulations—and to do so as quickly as possible. Such a question underpins the entire regulation and is of the nature that agreement cannot possibly be reached between the parties without judicial review. Respondents and Movant-Intervenors incorrectly assert that this Court has rejected previous attempts

to bifurcate, and, indeed has only bifurcated "under manifestly different circumstances," and such assertions in no way diminish the Court's authority and discretion to bifurcate here. This Court has most certainly exercised such discretion in the past, often as a means to manage judicial review in highly complex environmental cases.[2]

In addition, Petitioners believe that bifurcation of the briefing schedule will allow the scope of implementation-based issues to be narrowed if not resolved without judicial involvement. For example, certain compliance aspects of the Rule will, Petitioners hope, be addressed by EPA. Some implementation-based issues may not be ripe for review until reconsideration petitions are decided by EPA. Other implementation issues are of the nature that Petitioners believe they may be informally resolved through ongoing discussions with DOJ and EPA, without the need for litigation. Bifurcating the briefing is logical, therefore, as a means to litigate the fundamental issue of whether EPA has authority to promulgate the regulation at bar, while affording the more technical implementation issues an

[2] *See, e.g.*, *Nat'l Alliance of Forest Owners v. EPA*, No. 15-1478 (D.C. Cir. Jan. 21, 2016), ECF No. 1594946 (Severing compliance-based issues related to biomass energy from main legal challenges to EPA's Clean Power Plan and holding those issues in abeyance); *United States Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. Oct. 13, 2016), ECF No. 1461576 (Severing reconsideration issues from the main case and granting EPA's request to sever certain issues and hold those issues in abeyance pending judicial review); *Am. Petroleum Inst. v. EPA*, No. 12-1408, ECF No. 1428803 (April 3, 2013) (Granting Petitioners' request to bifurcate the rule challenge into two pieces: promulgation of New Source Performance Standards and promulgation of national emissions standards for hazardous air pollutants).

opportunity to resolve—either through administrative reconsideration or settlement among the parties—without the need for judicial review.

## III. Bifurcation makes sense, as the issues can be divided into fundamental legal issues and implementation-based issues.

Respondents and Movant-Intervenors incorrectly assert that the issues in this case "cannot, as a practical matter, be cleanly divided into fundamental legal issues and implementation-based issues," and they insinuate that Petitioners' wish to bifurcate the briefing so as to include whatever they want in both briefs. EPA Response at 3–4. This is disingenuous, as it insinuates that neither the Court nor the parties would be able to discern the differences between fundamental legal issues and implementation-based issues. Nevertheless, given Respondents' and Movant-Intervenors' deliberate blurring of those issues, Petitioners wish to take this time to better define the differences.

As stated above and as discussed in Petitioners' motion, the fundamental legal issues are ultimately threshold questions of authority. Most Petitioners raise fundamental issues regarding EPA's authority to issue the Rule at all.[3] These include whether EPA lacks authority under the CAA because it failed to make an endangerment finding with respect to the oil and natural gas source category in order to establish standards of performance for methane emissions from those

[3] *See* n.1, *supra.*

sources; whether EPA could use—and rely on—the "White Paper" process in promulgating the Rule; and whether the scope of the source category is lawful.

In sharp contrast, beyond fundamental issues of legal authority and validity, and assuming EPA has authority to issue a rule like this, some Petitioners raise record-based and fact-bound issues regarding the Rule's enactment. Many of the implementation-based issues are specific and diverse. Petitioners' implementation-based issues[4] include whether the Rule is arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law because:

1. The Rule's delay of repair provisions for the leak detection and repair ("LDAR") program provide inadequate time for compressor station and well site owners and operators to complete delayed repairs and replacements after triggering events including, but not limited to, unscheduled and emergency vent blowdowns;

2. The Rule's LDAR monitoring plan requirements will impose significant burdens on compressor station and well site owners and operators while providing little, if any, benefit in fugitive emissions reductions;

3. The Rule's recordkeeping requirements for LDAR monitoring will impose significant burdens on compressor station and well site owners and operators while providing little, if any, benefit in fugitive emission reductions;

4. The Rule applies different repair threshold levels for monitoring conducted by optical gas imaging ("OGI") and Method 21;

[4] Petitioners recognize EPA's and the Court's need for clarity on the scope of the two categories of issues. Petitioners at this stage have diligently attempted to list implementation-based issues in this reply, while acknowledging that there is a potential that as the parties work to try to resolve these issues, the scope or precise nature of the issues may deviate from this particular list.

5. The Rule's zero-degree Fahrenheit waiver threshold for quarterly LDAR monitoring at compressor stations and well sites is too low to provide meaningful regulatory relief to compressor station and well site owners and operators that avoids significant and unnecessary burdens and protects the health and safety of monitoring and repair personnel;

6. EPA failed to include a definition for "compressors" that clearly excluded from regulation under the Rule all compressors other than the centrifugal and reciprocating compressors that are directly regulated under 40 C.F.R. Part 60, Subpart OOOOa;

7. The Rule's definition of "fugitive emissions component" is ambiguous and fails to give compressor station owners and operators sufficient notice of the components that may be subject to LDAR monitoring;

8. EPA failed to respond to comments regarding the cost-effectiveness of LDAR monitoring for midstream assets located on well sites or near producers' well pads;

9. EPA failed to include a provision in the Rule that excludes compressor stations and equipment from the definition of "affected facility" or otherwise waives the Rule's requirements if the compressor station or equipment falls below the Rule's affected source thresholds;

10. The equation included in the Rule's definition of Capital Expenditure is not representative of current economic conditions;

11. Table 3 to Subpart OOOOa of 40 C.F.R. Part 60 does not include "the collection of fugitive emissions components at a compressor station" among the equipment types that are excluded from the general reconstruction notification requirements in 40 C.F.R. § 60.15(d);

12. EPA failed to give owners and operators of compressor stations and well sites sufficient time to conduct initial LDAR monitoring at affected facilities;

13. EPA failed to clarify in 40 C.F.R. §§ 60.5420(a)(1) and 60.5420a(a)(1) that the notification requirements in 40 C.F.R. § 60.15(d) do not apply to pneumatic controllers, centrifugal compressors, reciprocating

compressors, storage vessels, and collections of fugitive emissions components at compressor stations;

14. EPA failed to clarify that VRUs are not required to be operational when the VRU's associated storage vessel affected facility is not in service;

15. EPA failed to clarify whether the 95% emissions reduction requirement for centrifugal compressors, pneumatic pumps, and storage vessels must be met on a continuous or average basis;

16. EPA requires owners and operators of storage vessels that emit less than 4 tons per year ("tpy") of volatile organic compounds ("VOCs") to determine the uncontrolled actual VOC emission rate on a monthly rather than annual basis;

17. The Rule's provisions in 40 C.F.R. §§ 60.5400a(e) and 60.5422a(a) requiring compliance with 40 C.F.R. § 60.487a are vague and fail to provide owners and operators of affected facilities with notice of which portions of 40 C.F.R. § 60.487a are applicable;

18. The recordkeeping requirements in 40 C.F.R. §§ 60.5340(c)(14) and 60.5340a(c)(14) fail to include cross-references to the recordkeeping requirements in 40 C.F.R. §§ 60.5413(e)(4) and 60.5413a(e)(4);

19. The definitions of "certifying official" in 40 C.F.R. Part 60, Subparts OOOO and OOOOa and the definition of "responsible official" in 40 C.F.R. Part 60, Subpart OOOO include references to permits and permitting authorities despite the fact that 42 U.S.C. § 7411 is not a permitting program;

20. EPA failed to clarify in 40 C.F.R. §§ 60.5410(c)(1) and 60.5410a(c)(1) that owners and operators of reciprocating compressor affected facilities must measure the number of hours or number of months of operation beginning with the latter of (1) initial startup, (2) the date of the relevant rulemaking proposal, or (3) the last rod packing replacement.

As can be seen from this lengthy list, while Petitioners' implementation-based issues are of immediate importance given that the Rule is currently in effect,

they appear more appropriate for discussions on a negotiated resolution with the government as opposed to litigation. This approach would minimize or avoid the risk of noncompliance in the near term. Failure to bifurcate the implementation-based issues from the core issues would require multiple, lengthy briefs to address issues that may be more appropriately resolved through informal discussions.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant Petitioners Motion to Govern Further Proceedings; consolidate the litigation associated with the 2012 NSPS Rule and the 2014 NSPS Rule litigation with the 2016 NSPS Rule litigation; bifurcate the litigation into two briefing schedules; hold the litigation of the implementation-based issues in abeyance pending discussions among the parties; and provide the parties with 30 days from the date of the Court's order on consolidation and bifurcation to propose to the Court a briefing format and schedule for fundamental legal issues as described herein.

Dated: November 14, 2016

Respectfully submitted,

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

*/s/ Paul M. Seby*
Paul M. Seby
Special Assistant Attorney General

Matthew A. Sagsveen
Assistant Attorney General
North Dakota Attorney General's Office

State of North Dakota
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel. (303) 572-6584
Fax (303) 572-6540
Email: sebyp@gtlaw.com

500 N. 9th Street
Bismarck, ND 58501
Tel. (701) 328-2925
Email: masagsve@nd.gov

***Counsel for Petitioner State of North Dakota***

Case No. 16-1257

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

SCOTT KELLER
Solicitor General of Texas

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

*/s/ Craig J. Pritzlaff*
CRAIG J. PRITZLAFF
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 56496
craig.pritzlaff@oag.texas.gov

MARK A. STEINBACH
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 59880
mark.steinbach@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

***Counsel for Petitioners State of Texas***

Case No. 16-1262

*/s/ James D. Elliott*
James D. Elliott (DC Bar #46965)
Spilman Thomas & Battle, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
Phone: (717) 791-2012
Fax: (717) 795-2743
jelliott@spilmanlaw.com

***Counsel for the Independent Petroleum Association of America, American Exploration & Production Council, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Illinois Oil & Gas Association, Independent Oil and Gas Association of West Virginia, Inc., Indiana Oil and Gas Association, International Association of Drilling Contractors, Kansas Independent Oil & Gas Association, Kentucky Oil & Gas Association, Michigan Oil and Gas Association, National Stripper Well Association, North Dakota Petroleum Council, Ohio Oil and Gas Association, Oklahoma Independent Petroleum Association, Pennsylvania Independent Oil & Gas Association, Texas Alliance of Energy Producers, Texas Independent Producers & Royalty Owners Association, and West Virginia Oil and Natural Gas Association***

Case No. 16-1263

*/s/ Sandra Y. Snyder*
Sandra Y. Snyder
Interstate Natural Gas Association of America
20 F Street, N.W., Suite 450
Washington D.C. 20001
202.216.5900 telephone
202.216.0870 facsimile
ssnyder@ingaa.org

***Counsel for Petitioner Interstate Natural Gas Association of America***

Case No. 16-1264

*/s/ Thomas M. Johnson, Jr.*
Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Thomas M. Johnson, Jr.
Deputy Attorney General
*Counsel of Record*
Katlyn M. Miller
Assistant Attorney General
State Capitol Building 1,
Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: thomas.m.johnsonjr@wvago.gov

***Counsel for Petitioner State of West Virginia***

*/s/ Andrew Brasher*
Luther Strange
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
*Counsel of Record*
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us

***Counsel for Petitioner State of Alabama***

*/s/ John R. Lopez IV*
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
John R. Lopez IV
Solicitor General
*Counsel of Record*
1275 West Washington St.
Phoenix, AZ 85007
Tel: (602) 542-8986
Fax (602) 542-8308
john.lopez@azag.gov

***Counsel for Petitioner State of Arizona***

*/s/ Jeffrey A. Chanay*
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
*Counsel of Record*
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov

***Counsel for Petitioner State of Kansas***

*/s/ Joseph A. Newberg, II*
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Mitchel T. Denham
Assistant Deputy Attorney General
Joseph A. Newberg, II
Assistant Attorney General
*Counsel of Record*
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

***Counsel for Petitioner Commonwealth of Kentucky***

*/s/ Steven B. "Beaux" Jones*
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Elizabeth B. Murill
Solicitor General
*Counsel of Record*
Steven B. "Beaux" Jones
Assistant Attorney General
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
MurrillE@ag.louisiana.gov

***Counsel for Petitioner State of Louisiana***

*/s/ Aaron D. Lindstrom*
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
*Counsel of Record*
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

***Counsel for Petitioner Attorney General Bill Schuette for the People of Michigan***

*/s/ Dale Schowengerdt*
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Alan Joscelyn
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
*Counsel of Record*
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

***Counsel for Petitioner State of Montana***

*/s/ Eric E. Murphy*
Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
*Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

***Counsel for Petitioner State of Ohio***

*/s/ Patrick R. Wyrick*
E. Scott Pruitt
ATTORNEY GENERAL OF OKLAHOMA
Patrick R. Wyrick
Solicitor General
*Counsel of Record*
P. Clayton Eubanks
Deputy Solicitor General
Oklahoma Office of the
Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
Fax: (405) 522-0608
jared.haines@oag.ok.gov
docket@oag.ok.gov

***Counsel for Petitioner State of Oklahoma***

*/s/ James Emory Smith, Jr.*
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
*Counsel of Record*
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

***Counsel for Petitioner State of South Carolina***

/s/ Misha Tseytlin
Brad Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
*Counsel of Record*
Andrew Cook
Deputy Attorney General
Delanie M. Breuer
Assistant Deputy Attorney General
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

***Counsel for Petitioner State of Wisconsin***

*/s/ Sam M. Hayes*
Sam M. Hayes
General Counsel
*Counsel of Record*
Craig Bromby
Deputy General Counsel
Andrew Norton
Deputy General Counsel
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
1601 Mail Service Center
Raleigh, NC 27699-1601
Tel: (919) 707-8616
sam.hayes@ncdenr.gov

***Counsel for Petitioner North Carolina Department of Environmental Quality***

/s/ Jacquelyn A. Quarles
Charles G. Snavely
SECRETARY, COMMONWEALTH OF KENTUCKY ENERGY AND ENVIRONMENT CABINET
John G. Horne, II
General Counsel
Office of General Counsel
Jacquelyn A. Quarles
Deputy General Counsel
Office of General Counsel
*Counsel of Record*
300 Sower Blvd., 3rd Floor
Frankfort, KY 40601
Tel: (502) 782-7043
Jackie.Quarles@ky.gov

***Counsel for Petitioner Commonwealth Kentucky Energy and Environment Cabinet***
Case No. 16-1266

*/s/ John R. Jacus*
John R. Jacus, Esq.
Eric P. Waeckerlin, Esq.
D.C. Bar No. 977228
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Telephone: (303) 892-9400
Facsimile: (303) 893-1379
E-mail: John.Jacus@dgslaw.com
E-mail: Eric.Waeckerlin@dgslaw.com

***Counsel for Western Energy Alliance***

Case No. 16-1269

*/s/ Shannon S. Broome*
SHANNON S. BROOME
Hunton & Williams LLP
575 Market St.
Suite 3700
San Francisco, CA 94105
(415) 975-3718
sbroome@hunton.com

*/s/ Charles H. Knauss*
CHARLES H. KNAUSS
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, D.C. 20037
(202) 419-2003
cknauss@hunton.com

***Counsel for Petitioner Texas Oil and Gas Association***

API v. EPA, No. 16-1270

*/s/ William L. Wehrum*
William L. Wehrum
Felicia H. Barnes
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
wwehrum@hunton.com
fbarnes@hunton.com

*Of Counsel*
Stacy R. Linden
John Wagner
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, D.C. 20005
(202) 682-8000

***Counsel for Petitioner American Petroleum Institute***

GPA Midstream v. EPA, No. 16-1267

/s/ Roger R. Martella, Jr.
Roger R. Martella, Jr.
Samuel B. Boxerman
Joel F. Visser
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

*Counsel for GPA Midstream Association*

## CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the foregoing **Reply in Support of Petitioners' Motion to Govern Further Proceedings** with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Paul M. Seby*
Paul M. Seby
Special Assistant
Attorney General
State of North Dakota

***Counsel for Petitioner State of North Dakota***